

United States District Court
For the Northern District of California

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6 IN THE UNITED STATES DISTRICT COURT

7 FOR THE NORTHERN DISTRICT OF CALIFORNIA

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10 LI CHING CHU, ROBERT CHING LIANG
11 HUNG, individually and as successors-in-
interest to CINDY K. HUNG (deceased),

No. C 12-05306 WHA

12 Plaintiffs,

Related to

13 v.

No. C 11-04990 WHA

14 TRIBAL TECHNOLOGIES, INCORPORATED,
15 TRIBAL BRANDS, INCORPORATED, JEFF
16 MARTIN, JOE VIERRA, and VICTORIA
DINOVICH

**ORDER GRANTING
DEFENDANTS' MOTIONS
TO DISMISS**

17 Defendants.
18 _____ /

19 **INTRODUCTION**

20 In this action arising out of a death, defendants move to dismiss via three separate
21 motions. To the extent stated below, the motions to dismiss are **GRANTED**. A separate motion to
22 strike is **DENIED** as moot.

23 **STATEMENT**

24 Plaintiffs Li Ching Chu and Robert Ching Liang Hung are the surviving parents of Cindy
25 K. Hung (Chu Decl. ¶ 1; Hung Decl. ¶ 1). Plaintiffs alleged that at all relevant times, defendants
26 Tribal Technologies and Tribal Brands were Delaware corporations that qualified as
27 “employers” under the California Fair Employment and Housing Act (Compl. ¶¶ 6–7).
Defendant Jeff Martin was the Chief Executive Officer of both corporations (*id.* at ¶ 8).
28 Defendant Joe Vierra was the Vice President of Tribal Technologies (*id.* at ¶ 9). Defendant

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1 Victoria Dinovich was a software engineer for Tribal Technologies (*id.* at ¶ 10). Ms. Hung
2 worked for both Tribal Technologies and Tribal Brands (together “Tribal”) (*id.* at ¶ 14). On
3 October 21, 2010, Ms. Hung’s body was found on top of a breezeway at her office building
4 (*ibid.*).

5 Despite having already filed an identical action in state court, plaintiffs filed a complaint
6 in federal court in 2011 (Case No. 11-04990-WHA). The complaint alleged several state law
7 claims, including wrongful death, against Tribal Technologies, Glenborough 400 ECR, LLC (the
8 corporation that operated the office building), and 100 John Does working for Tribal. In January
9 2012, the complaint was dismissed for lack of subject-matter jurisdiction. Despite several
10 hearings explaining the defect to counsel both before and after the January dismissal order (as
11 well as possibly how it might be cured), plaintiffs failed to cure. Counsel filed two motions
12 seeking leave to file a first amended complaint, but both were denied for failure to allege
13 diversity jurisdiction properly. The complaint was dismissed without leave to amend and
14 judgment was entered. Plaintiffs appealed (and that appeal is still pending).

15 On October 16, 2012, while the appeal was pending, plaintiffs commenced the instant,
16 new action (Case No. 12-05306-WHA). The complaint is based on the same set of facts (Dkt.
17 No. 1). The new action was reassigned to the undersigned judge (Dkt. No. 4, 19). Plaintiffs now
18 allege four employment-related state law claims in their individual capacities and as
19 successors-in-interest to Ms. Hung: (1) sexual harassment; (2) retaliation; (3) breach of contract;
20 and (4) wrongful termination in violation of public policy. The first, second, and fourth claims
21 derive from California’s Fair Employment and Housing Act (Compl. ¶ 55). Plaintiffs do not
22 specify the source of relief for the breach of contract, but this order will assume it to be a state
23 law claim, to which California law applies.

24 **ANALYSIS**

25 **1. LEGAL STANDARD.**

26 To survive a FRCP 12(b)(6) motion to dismiss, a complaint must contain sufficient
27 factual matter that, if accepted as true, states a claim for relief plausible on its face. *Ashcroft v.*
28 *Iqbal*, 556 U.S. 662, 678 (2009). A facially plausible claim will specify sufficient factual

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1 allegations from which reasonable inferences establishing the defendant's liability can be drawn.
2 *Ibid.* While a court "must take all of the factual allegations in the complaint as true," it is "not
3 bound to accept as true a legal conclusion couched as a factual allegation." *Id.* at 678 (quoting
4 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)) (internal quotation marks omitted).
5 This "plausibility standard" is not a probability requirement. *Ibid.* Still, "it asks more than a
6 sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are
7 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and
8 plausibility of entitlement to relief.'" *Ibid.* (quoting *Twombly*, 550 U.S. at 557) (internal
9 quotations marks omitted).

10 **2. PLAINTIFFS MUST EXHAUST ADMINISTRATIVE REMEDIES
11 BEFORE BRINGING SUIT.**

12 Defendants contend that, even assuming plaintiffs can bring FEHA claims on Ms. Hung's
13 behalf, the claims should be dismissed for failure to exhaust administrative remedies. This order
14 agrees.

15 **A. FEHA Claims Survive The Decedent.**

16 There is no controlling authority on whether FEHA claims survive a decedent who had
17 yet to file an administrative claim with the Department of Fair and Equal Housing ("DFEH").
18 Other circuits, however, have applied state survivability statutes to determine whether various
19 rights of action similar to FEHA survive the decedent. *See, e.g., Jenson v. Eveleth Taconite Co.*,
20 130 F.3d 1287, 1304 (8th Cir. 1997); *Slade for Estate of Slade v. U.S. Postal Serv.*, 952 F.2d
21 357, 360 (10th Cir. 1991). At least one court, applying California law, granted leave to allege a
22 survivor FEHA claim. *Livingston v. Kemper Sports Mgmt., Inc.*, No. 12-01427, 2012 WL
23 5349174 (E.D. Cal. Oct. 26, 2012). In *Livingston*, the wife and children of a decedent employee
24 sued the decedent's employer under FEHA. The court ruled that though the non-employee
25 plaintiffs lacked standing to assert FEHA claims against the employer-defendants, they could file
26 an amended complaint alleging a survivor action for the same claims. *Id.* at *5-7.

27 Applying California law, this order first finds that FEHA does not contain a survivability
28 provision. Where there is no specific provision regarding survivability, a court should apply
California's general survivability statute. "Except as otherwise provided by statute, a cause of

1 action for or against a person is not lost by reason of the person's death, but survives subject to
 2 the applicable limitations period." Cal. Civ. Proc. Code § 377.20(a). Assuming that a FEHA
 3 claim survives under California's survivability statute, plaintiffs effectively step into Ms. Hung's
 4 shoes as her successors-in-interest.

5 A cause of action that survives the death of the person entitled to
 6 commence an action or proceeding passes to the decedent's
 7 successor in interest, subject to Chapter 1 (commencing with
 8 Section 7000) of Part 1 of Division 7 of the Probate Code, and an
 9 action may be commenced by the decedent's personal
 10 representative or, if none, by the decedent's successor in interest.
 11

12 Cal. Civ. Proc. Code § 377.30.

13 **B. Plaintiffs Must Exhaust Administrative Remedies.**

14 The law requiring the exhaustion of FEHA's administrative remedies before filing suit is
 15 well settled in California. *Rojo v. Kliger*, 52 Cal.3d 65 (1990) (en banc); *see also Rodriguez v.*
Airborne Express, 265 F.3d 890 (9th Cir. 2001) (applying California law).

16 [E]xhaustion of the FEHA administrative remedy is a precondition
 17 to bringing a civil suit *on a statutory cause of action*. In cases
 18 appropriate for administrative resolution, the exhaustion
 requirement serves the important policy interests embodied in the
 act of resolving disputes and eliminating unlawful employment
 practices by conciliation . . . as well as the salutary goals of easing
 the burden on the court system, maximizing the use of
 administrative agency expertise and capability to order and
 monitor corrective measures, and providing a more economical
 and less formal means of resolving the dispute

19 *Rojo*, 52 Cal. 3d at 83 (citations omitted) (emphasis in original). No controlling authority,
 20 however, has yet addressed whether the estate, personal representative, or successor-in-interest
 21 to a decedent with a surviving FEHA claim must also exhaust administrative remedies before
 22 filing suit. At least one court dismissed a state statutory claim similar to FEHA when the
 23 plaintiff, in her capacity as the personal representative of the decedent, failed to exhaust
 24 administrative remedies. *Tafoya v. Bobroff*, 865 F. Supp. 742, 747–48 (D.N.M. 1994).

25 California Government Code Section 12960 establishes the procedure by which
 26 aggrieved employees may file a complaint with DFEH. Section 12965(b) lays out how they can
 27 then obtain a right-to-sue letter:

28 If a civil action is not brought by the [DFEH] within 150 days after
 29 the filing of a complaint, or if the [DFEH] earlier determines that

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1 no civil action will be brought, the [DFEH] shall promptly notify,
2 in writing, the person claiming to be aggrieved that the [DFEH]
3 shall issue, on his or her request, the right-to-sue notice. This
4 notice shall indicate that the person claiming to be aggrieved may
bring civil action under this part against the person, employer,
labor organization, or employment agency named in the verified
complaint within one year from the date of that notice.

5 Therefore, “[i]n order to bring a civil action under FEHA, the aggrieved person must exhaust
6 the administrative remedies provided by law.”” *Airborne Express*, 265 F.3d at 896 (quoting
7 *Yurick v. Superior Court*, 209 Cal. App. 3d 1116, 1121 (1989)). “Exhaustion in this context
8 requires filing a written charge with DFEH within one year of the alleged unlawful employment
9 discrimination, and obtaining notice from DFEH of the right to sue.” *Airborne Express*, 265
10 F.3d at 896 (citations omitted). Thus, the general exhaustion rule requires that employees obtain
11 a right-to-sue letter prior to filing a civil action.

12 Still, “[t]hese procedural requirements, as with all provisions of FEHA, are to ‘be
13 construed liberally for the accomplishment of the purposes [of FEHA].’” *Id.* at 897 (quoting
14 Cal. Gov’t Code § 12993(a)). “The administrative time limits prescribed by FEHA are treated as
15 equivalent to statutes of limitations and are subject to equitable doctrines such as waiver,
16 estoppel, and tolling.” *Airborne Express*, 265 F.3d at 900 (citations omitted). One such example
17 is the “*Denney exception*,” which may excuse non-exhaustion if it “can be attributed to the
18 administrative agency (generally the DFEH) charged with processing his complaint.” *Id.* at 900-
19 01 (citing *Denney v. Universal City Studios, Inc.*, 10 Cal. App. 4th 1226, 1232-34 (1992)
20 (abrogated on other grounds)). That exception aided the plaintiff in *Airborne Express*, who
21 having originally filed a race discrimination charge with the DFEH, later made an untimely
22 amendment to include disability discrimination. 265 F.3d at 897-98. Because the plaintiff’s
23 affidavit created a triable issue of fact as to whether the DFEH misled him about his disability
24 discrimination claim, the Ninth Circuit reversed summary judgment and remanded. *Id.* at 902.

25 Plaintiffs here are not so fortunate. Their only argument regarding exhaustion is that the
26 law could not possibly demand that an employee allegedly killed by her employers file a claim
27 with the DFEH post-mortem. As to the decedent, of course this seems true. But the law
28 demands that her *personal representatives* file a claim on her behalf. Assuming that Ms.

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1 Hung's untimely death on October 21, 2010, was the last day she suffered the alleged FEHA
2 violations, then her FEHA claims survived for her successors-in-interest *subject to the*
3 *applicable limitations period.* Cal. Civ. Proc. Code § 377.20(a). This means plaintiffs, as their
4 daughter's successors-in-interest, effectively stepped into their daughter's shoes and were
5 required to file a claim with the DFEH by October 21, 2011. Cal. Gov't Code § 12960(d).

6 Plaintiffs have not alleged that they filed any such claim with the DFEH or obtained a
7 right-to-sue letter. On the contrary, they seem to assume that given the allegations, they did not
8 need to. While defendants do not identify any statute or decision affirmatively requiring the
9 estate, personal representative, or successor-in-interest of an aggrieved decedent to exhaust
10 administrative remedies, the converse also holds true: plaintiffs cannot point to any statute or
11 decision affirmatively *excusing* them from such requirement. Plaintiffs fail to recognize that
12 California's survivorship statute, which presumably provides their right to Ms. Hung's FEHA
13 claims, requires that they exhaust administrative remedies prior to filing suit, just like any other
14 FEHA plaintiff. *See Airborne Express*, 265 F.3d at 896. Unless a qualifying equitable doctrine
15 applies, plaintiffs' failure to exhaust administrative remedies bars their FEHA-related claims.
16 Plaintiffs have not alleged any valid excuse for failing to exhaust.

17 To the extent stated above, defendants' motions to dismiss the first, second, and fourth
18 claims are **GRANTED**.

19 **3. PLAINTIFFS' BREACH OF CONTRACT CLAIM
20 MUST BE DISMISSED FOR FAILURE TO STATE A CLAIM.**

21 Defendants also contend that because plaintiffs failed to adequately plead any legally
22 cognizable breach of contract, their third claim must be dismissed. This order agrees. Plaintiffs
23 alleged that defendants breached Ms. Hung's employment contract by murdering her (Compl.
24 ¶ 49). This order need not address whether such a claim survives the decedent because plaintiffs
25 failed to sufficiently plead their claim, as now explained.

26 **A. Plaintiffs Insufficiently Pleaded Their Breach-of-Contract Claim.**

27 It is unclear from the complaint whether plaintiffs pleaded their breach-of-contract claim
28 in their individual capacities or on Ms. Hung's behalf. Either way, their claim fails here.

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1 *First*, plaintiffs have not alleged that they were parties to the contract, or how they
2 otherwise have standing to claim individual harms for the alleged breach of contract. Nor have
3 plaintiffs pleaded what express provision or implied covenant defendants allegedly breached.

4 *Second*, assuming plaintiffs meant to allege a survivor claim for the breach, they failed to
5 plead with sufficient specificity *how* defendants allegedly breached the contract. Plaintiffs
6 alleged an at-will “written employment agreement” and that Ms. Hung satisfactorily performed
7 her end of the agreement up until her death (Compl. ¶¶ 49–50). They also alleged that “Cindy
8 did not by any means agree to being murdered by her co-workers,” but they did not allege any
9 breach of an express provision of the agreement (*id.* at ¶ 49).

10 On the contrary, plaintiffs seem to acknowledge that no breach of an express contractual
11 provision occurred. Plaintiffs alleged that “[d]efendant-employer terminated the contract by
12 fostering an [sic] hostile working environment, condoning the murder by defendants’ employees
13 and cover-up [sic] the crime by obstructing the investigation. These covenants are not expressly
14 written into a contract because these are implied covenants” (Opp., Dkt. No. 41, at 4–5).
15 Yet plaintiffs failed to allege what legally cognizable implied covenant defendants allegedly
16 breached. If any such claim were ever to be recognized, surely it would have to be pled with
17 specificity under FRCP Rule 9(b).

18 Plaintiffs argue that public policy considerations should allow claims like theirs to
19 proceed. Otherwise, employers could “murder with impunity” and employees would have to
20 “contemplate murder by the employer as a way of terminating . . . employment” (Opp.,
21 Dkt. No. 41, at 5). Murder must be condemned, to be sure, but this does not save the novel civil
22 claim now advanced. There already exist many criminal and civil remedies for murder,
23 including for an employer’s murder of an employee, some of which plaintiffs unsuccessfully
24 pursued in the prior action. This order cannot find any authority that treats an alleged murder as
25 a breach of an at-will employment contract or any employment contract for that matter. In fact,
26 “death or permanent disability of one employed for services of a personal nature terminates the
27 contract” *Rench v. Watsonville Meat Co.*, 292 P.2d 85, 89 (Cal Ct. App. 1956).

28 To the extent stated above, defendants’ motions to dismiss the third claim are **GRANTED**.

1 **4. PLAINTIFFS IMPROPERLY PLEAD SUBJECT-MATTER JURISDICTION**

2 While plaintiffs allege claims in both their individual capacities and as successors-in-
3 interest, their counsel again fails to assert diversity jurisdiction properly. As the order
4 dismissing the related case reminded counsel, complete diversity is required, 28 U.S.C. 1332(a),
5 the burden of establishing diversity jurisdiction falls on the party asserting it, *Kokkonen v.*
6 *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994), and it must be affirmatively alleged.
7 *Bautista v. Pan Am. World Airlines*, 828 F.2d 546, 552 (9th Cir. 1987).

8 For the individual claims: plaintiffs allege that they are Taiwanese citizens, but if they
9 are also permanent residents, the state they are domiciled in becomes their state for diversity
10 purposes. See 28 U.S.C. 1332(a)(2). Plaintiffs also allege that at least one of the defendants is a
11 corporation with its principal place of business in California (Compl. ¶ 6). This makes the
12 corporation a citizen of California for diversity purposes. 28 U.S.C. 1332(c)(1). Therefore,
13 plaintiffs must affirmatively allege (if true) that they: either are not permanent residents or that
14 they are permanent residents but were not domiciled in the same state as any of the defendants
15 when this claim was filed.

16 For the claims as successors-in-interest: plaintiffs' counsel has "vagued out" Ms. Hung's
17 citizenship. As successors-in-interest, plaintiffs adopt their decedent daughter's citizenship. See
18 28 U.S.C. 1332(c)(2). The complaint, however, is silent on Ms. Hung's citizenship, while the
19 attached death certificate indicates she was born in Taiwan (Plaintiffs' Exh. 2) and one of
20 plaintiffs' opposition briefs state Ms. Hung was a citizen of Canada (Opp., Dkt. No. 40, at 7).
21 Furthermore, it is highly possible that Ms. Hung was a permanent resident of California; she
22 owned property in California (Plaintiffs' Exh. 1) and her employment in California presumably
23 gave rise to the current action. Therefore, plaintiffs must not only allege Ms. Hung's citizenship
24 in their complaint, but they must also allege (if true) that Ms. Hung: either was not a permanent
25 USA resident or that Ms. Hung was a permanent USA resident but was not domiciled in the
26 same state as any of the defendants when this claim was filed.

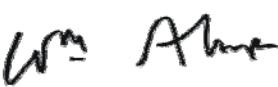
27 Plaintiffs must affirmatively allege (if true) all the particulars establishing complete
28 diversity jurisdiction in any amended complaint they file.

CONCLUSION

Therefore, to the extent stated above, defendants' motions to dismiss are **GRANTED**. Again, the district judge states, as he did in the previous action, that he is sympathetic to the family on their loss of Cindy Hung. When he went through the first action, the judge gave as much guidance as possible but counsel pursued a different course. This second federal action is deficient. Plaintiffs may motion to seek leave to file an amended complaint by February 15, 2013. The proposed amended complaint must affirmatively allege (if true) every particular necessary for complete diversity jurisdiction and must also address with specificity and in non-conclusory terms three matters: *first*, if and how plaintiffs exhausted their administrative remedies within the prescribed time period under FEHA; *second*, if and how any equitable doctrine excusing a failure to exhaust may apply to plaintiffs; and *third*, what express provisions or implied covenants defendants allegedly breached.

IT IS SO ORDERED.

Dated: January 25, 2013.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE